SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 834

WILBUR E. DOW,

Petitioner,

vs.

HAROLD L. ICKES, SECRETARY OF THE INTERIOR, AND HENRY L. STIMSON, SECRETARY OF WAR.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

For Opinions below, Jurisdiction, Statement of the Case, and Questions Presented see Pages 2 to 9 of the Petition.

I.

Rules and Regulations Made by the Secretary of the Interior Controlling Alaska Fisheries Are Subject to Judicial Review to Test Their Validity.

The Act of Congress in question delegated broad powers of supervision and control to the Secretary of the Interior for the regulation of Alaska fisheries with the clear re-

striction upon the exercise of such authority and discretion:

> "That no exclusive or several right of fishery shall be granted therein nor shall any citizen of the United States be denied the right to take, prepare, cure or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secertary of Commerce (Interior)". Page 5, supra.

As long as this standard is met, the Secretary has full discretion but he cannot exceed it. In *Payne* v. *Central Pacific Railway Co.*, 255 U. S. 228 (1921), the Supreme Court said that the Act therein

> "does not clothe the Secretary with any discretion to substitute his judgment for the will of Congress as manifested in the granting Act."

See also:

Brown v. *Humble Oil & Refining Co.*, 126 Tex. 296; 83 S. W. (2d) 935; 87 S. W. (2d) 1069;

A. L. A. Schechter Poultry Corp. v. *U. S.*, 295 U. S. 495, (1935); 79 L. Ed. 1570; 55 Sup. Ct. 837;

Panama Refining Co. v. *Ryan*, 293 U. S. 388 (1935); 79 L. Ed. 446; 55 Sup. Ct. 241;

Charles Uhden v. *Greenough*, 181 Wash. 412, 43 Pa. (2d) 983;

Roberts v. *U. S.*, 176 U. S. 221, 231 (1900).

In delegating to the Secretary the power to make rules and regulations covering fisheries in the waters of Alaska in the interests of conservation, Congress has placed a positive limitation on that power, namely, that no citizen is to be denied his right to fish where fishing is permitted. To violate that standard is going beyond his powers and is an abuse of any discretion vested in him under the Act.

To argue, as respondent did, that an "area" of Alaska referred to in the Regulations as "Alaska Peninsula Area,

Bristol Bay Area, Prince William Sound Area, etc." for purposes of defending this action, can be said to mean only the area required for the erection of a single trap and, therefore, any site opened by the Bureau is open to all, is misleading. This hypothesis, however, fails in the light of the agreement between the Secretary of the Interior and the Secretary of War for the issuance by the latter of only one permit, and that to the party originally requesting the site to be opened. As War Department permits are renewable the site continues in possession and control of the party who obtained it.

II.

Rules and Regulations Depriving Petitioner of His Statutory Right to Fish in the Waters of Alaska Is an Injury Entitling Him to His Remedy at Law.

The petitioner, Wilbur E. Dow, had been engaged in the fishing business in the Pacific Northwest and Alaska for the greater part of his life. In 1938, he made arrangements for the leasing of an idle cannery and applied for the right to operate traps at nearby points he had previously prospected. At these points, he believed he had found sufficient fish to justify the erection of a trap. He applied to the Treasurer of the Territory of Alaska and received his Territorial License, paying $200.00 for this privilege, and made application to the War Department and the Bureau of Fisheries for similar permits. These were denied without explanation as were the applications of all other new applicants, both for that year and every year since, although all sites opened prior to that time were permitted to remain open with the exception of 20 sites out of over 500 on which regular traps were never erected or were so unproductive as not to warrant further fishing.

As fishing is the only business with which petitioner is adequately familiar, he has been required to seek work

in a Seattle shipyard, although ready, able and willing to operate traps and a cannery in common with those now engaged in that work. There has never been any contention by the respondents that petitioner is not a citizen of the class referred to in the Statute.

III.

The Present Methods of Control Operate to Give Exclusive Privileges to a Few Individuals and Corporations to Fish by Trap in the Waters of Alaska to the Exclusion of All Other Citizens and Contrary to the Statute.

Four large corporations own or control one hundred per cent of the fishing operations in Southwestern Alaska and in excess of 80 per cent of the operations in Southeastern Alaska; these two areas comprise approximately 90 per cent of the entire Alaska Fishing industry. Of the twenty sites closed, all were either dummies on which proper traps had never been erected or which had been abandoned due to unprofitable operation, or traps owned by small individuals and their combined catch was less than any one of the more successful traps operated by the large companies, and of no real consequence to the industry.

Under the present rules of the Department, any citizen wishing a fish trap site applies for same by stating the exact latitude and longitude in degrees, minutes and seconds of the point of land where he wishes to locate his trap. The time limit for applications is usually December 1st of the current year. The necessary prerequisite of such application is that the applicant shall have his Alaskan fishing license covering the identical sites requested of the Department of the Interior, which petitioner had. As a fish trap is such a structure as projects into navigable waters, it is also required before the trap can be built, that a permit be obtained from the War Department for a

structure at that point. It is customary for the applicant to apply for his War Department permit at the same time that he applies to the Bureau of Fisheries for the opening of the site, and in this fashion, if the site is opened, he becomes the first applicant before the War Department for such site and so maintains his priority. The result of this arrangement is that when the Department of the Interior opens a site for fishing, it does in effect open it for the individual or firm that made the application, although he is not specifically named in the announcement in the Regulations. The Department has never yet opened a site for fishing except at the request of some firm or individual. As War Department permits run for three years (now one year) and are renewable, this in effect permanently reserves to the successful applicant that particular site.

As a result of the above arrangement, these fish trap permits issued by the Secretary of War are sold and leased as interests in property, directly contrary to the statement on the face thereof, that such permits are not to be deemed an interest in property.

As a result of the circumstances set forth above, those already in possession of trap sites have been, and are permitted to be, the only possessors of trap sites in Alaskan waters. Thus, the status quo in Alaskan fisheries is maintained for the benefit of those to whom sites have been granted and to the great detriment of those to whom they have been denied, contrary to the express provisions of the law.

IV.

If the Rules and Regulations Established by the Secretary Do Not Operate Within the Standard as Established in the Statute, the Court Must Declare Them Null and Void.

As the Statute sets forth many ways in which the Secretary may control the catch of salmon without infringing

the rights of citizens as guaranteed by the Statute, the Secretary should have no trouble in establishing proper regulations under the terms of the Act. The intent of the Act and an excellent explanation of the standard set up therein is to be found in the discussion which took place in the House and the Senate at the time of its enactment. This was quoted quite fully in petitioner's brief submitted in the Court of Appeals for the District of Columbia. In the Congressional Record for the 68th Congress, First Session, on Page 5973, the following discussion took place:

> "Mr. Hadley: * * * What the bill does is to provide that every citizen, operating whatever class of gear he may or will, is invited into the fishing areas where fishing is permitted by the Secretary of Commerce.
>
> Mr. Sutherland: Will the gentleman yield?
>
> Mr. Hadley: Yes.
>
> Mr. Sutherland: Does the gentleman contend that any citizen can fish with a trap?
>
> Mr. Hadley: I am making a general statement.
>
> Mr. Sutherland: That statement is very general.
>
> Mr. Hadley: Any citizen who has the facilities and has the capital may do so, but the citizen who operates a seine must also have a considerable investment to do that".

Similar discussion was frequently repeated and it was exceedingly clear that the purpose of the bill was to make fishing by trap available to any American who had the capital, foresight and energy to build a trap and fish in common and under the same conditions with all others who were similarly inclined.

Part of the discussion in the Senate, reported in the Congressional Record for May 26, 1924, on Pages 59 and 20, was as follows:

"Mr. Dill: Mr. President, I should like to ask my colleague a question. As I understand, the situation in Alaska has been very unsatisfactory as it has been handled up to this time, and those who object to the conditions which have prevailed there charge them largely to the Secretary of Commerce, claiming that he has not treated them fairly. As I understand, the bill gives the Secretary of Commerce practically absolute power.

Mr. Robinson: May I interrupt the Senator?

Mr. Dill: I yield.

Mr. Robinson: The Secretary of Commerce sought to give exclusive right to fish in certain Alaskan waters, and out of his attempt to give exclusive rights to fish, thus depriving a large number of people the right to pursue their usual vocation, great complaint arose. *This bill, however, denies to the Secretary of Commerce any power to grant an exclusive right to fish and requires him to give everyone equal rights within the areas where fishing is permitted.*

Mr. Dill: That is what I wanted to have made clear —as to whether this is an enlargement of his power or whether it is a limitation of his power.

Mr. Jones of Washington: This bill removes the principal cause of complaint with reference to the exercise of power by the Secretary of Commerce, just as the Senator from Arkansas has stated. Within the two reservations (Counsel's Note—privileged areas) that were created by Executive order a year or two ago, the Secretary of Commerce has seen fit to make regulations under which outsiders might not go in order to fish. *In other words, those who are already located there, if he thought they took all the fish that should be taken, were given the full rights, and nobody else could go in there and take fish.*

Mr. King: They were given exclusive rights." (Italics ours.)

Conclusion.

The petitioner in this action wants only an equal right to fish in common with all others enjoying a similar privilege. He wishes to compete on an equal basis with others engaged in the industry.

We submit, therefore, that the United States Court of Appeals for the District of Columbia erred in affirming the orders of dismissal of the District Court of the United States for the District of Columbia, and that petitioner's prayer for a writ of certiorari should be granted.

Respectfully submitted,

WILBUR E. DOW, JR.,
WILLIAM G. SYMMERS,
Attorneys for Petitioner.

New York, N. Y., January 2nd, 1942.